United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting on Bulletin Board

Will this opinion be Published? Yes

Bankruptcy Caption: APEX AUTOMOTIVE WAREHOUSE, L.P. , an Illinois Limited Partnership

THE WHITLOCK CORPORATION, a Minnesota corporation,

Debtors.

Bankruptcy No. 96 B 04594 & 96 B 04596 (Jointly Administered)

Adversary Caption: JOHN T. GRIGSBY, Chapter 11 Trustee for the Creditor Trust for Apex Automotive Warehouse, L.P., and the Whitlock Corporation,

Plaintiff,

v.

CARDONE INDUSTRIES, INC.

Defendant.

Adversary No. 98 A 00437

Date of Issuance: May 17, 2000

Judge: Erwin I. Katz

Appearance of Counsel: **See Page 2**

Attorney for Plaintiff:

Counsel for Plaintiff, John T. Grigsby, Chapter 11 Trustee

David J. Fischer, Esq.
Patricia McCarthy, Esq.
WILDMAN, HARROLD, ALLEN & DIXON
225 W. Wacker Dr.
Chicago, Il 60606-1229

Attorney for Defendant:

Counsel for Defendant, Cardone Industries, Inc.

Keith J. Shapiro, Esq.
Nancy A. Peterman, Esq.
GREENBERG TRAURIG
200 S. Wacker Dr., #3200
Chicago, IL 60606

Ethan D. Fogel, Esq.
Magdalen Braden, Esq.
DECHERT PRICE & RHOADS
400 Bell Atlantic Tower
1717 Arch St.
Philadelphia, PA 19103-2793

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 11 Cases
	)	
APEX AUTOMOTIVE WAREHOUSE, L.P.	)	
an Illinois Limited Partnership	)	Case No. 96 B 04594
	)	
	)	Case No. 96 B 04596
THE WHITLOCK CORPORATION,	)	(Jointly Administered)
a Minnesota corporation,	)	
	)	
Debtors.	)	Honorable Erwin I. Katz
	)	
JOHN T. GRIGSBY, Chapter 11 Trustee for	)	
the Creditor Trust for Apex Automotive	)	
Warehouse, L.P. and the Whitlock Corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 98 A 00437
	)	
CARDONE INDUSTRIES, INC.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This adversary case is a core proceeding in the jointly administered bankruptcies filed by Apex Automotive Warehouse, L.P., an Illinois limited partnership ("Apex"), and The Whitlock Corporation, a Minnesota corporation ("Whitlock"), (Collectively, "Debtors") under Chapter 11 of the Bankruptcy

Code.[1] John Grigsby, Jr., ("Plaintiff"), serving as trustee of the Creditor Trust established by Debtors' confirmed plan of reorganization, has filed a complaint to avoid and recover prepetition transfers made by Debtors to Defendant Cardone Industries, Inc., ("Cardone").

This matter comes before the Court on cross motions for summary judgment filed pursuant to Federal Rule of Civil Procedure 56, incorporated into bankruptcy proceedings by Rule 7056[2], and Local Rule 402.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure §15(a) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F). Venue for this proceeding lies under 28 U.S.C. § 1409.

BACKGROUND

This is a dispute over the avoidability under § 547 of transfers made by Debtors to Cardone within 90 days of the filing of Debtors' bankruptcy petitions.

Whitlock is a Minnesota corporation. In January, 1995, Whitlock was wholly acquired by Apex, an Illinois limited partnership. Both Apex and Whitlock operated as retailers of after-market automotive parts.

Cardone is a supplier of remanufactured automotive products. Cardone provided inventory to both Apex and Whitlock prior to Debtors' bankruptcy filings. As payment for amounts owed for previous inventory shipments, Cardone received checks tendered by Whitlock in the amounts of

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[1] 11 U.S.C. §§ 101-1330.

[2] Unless otherwise indicated, references to Rules are to the Federal Rules of Bankruptcy Procedure and all statutory references are to Title 11 of the United States Code.

$123,392.18 and $263,482.63 received on or about November 25, 1995 and December 27, 1995, respectively.[3] Less than 90 days later, on February 22, 1996, Debtors filed voluntary bankruptcy petitions under Chapter 11 of the United States Bankruptcy Code.

On September 24, 1996, the Debtors' Third Amended Consolidated Plan of Reorganization was confirmed by order of this Court. Article 9 of this Plan creates a Creditor's Trust and § 9.4 of the Plan provides for the appointment of a trustee as representative of Debtors' estate to prosecute pre-confirmation rights of action. Plaintiff, John Grigsby, Jr., was appointed as trustee for the Creditor's Trust to prosecute such actions.

On February 20, 1998, Plaintiff filed the present adversary complaint seeking to avoid and recover the disputed transfers as preferences under §§ 547 and 550 and to have Cardone's unsecured claim against the estate disallowed pursuant to § 502(d). On November 26, 1999, Plaintiff filed a motion for summary judgment in its favor on the adversary complaint. On January 5, 2000, Cardone filed its response and a cross-motion for summary judgment in its favor.

Finding that, when appropriate inferences are made, neither side has demonstrated that it is entitled to judgment as a matter of law and finding genuine issues of material fact to exist with relation to Cardone's asserted affirmative defenses under § 547(c)(2) and (4), both Plaintiff's motion for summary judgment and Cardone's cross-motion for summary judgment are denied.

APPLICABLE STANDARDS

The purpose of summary judgment is to avoid unnecessary trials when there is no genuine issue

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[3] Plaintiff seeks to recover preferences in the amount of $262,349.94 which represents the total amount paid by Debtors ($386,874.81) minus the alleged amount of subsequent new value provided by Cardone ($124,524.87).

of material fact. *Farries* v. *Stanadyne/Chicago Div*., 832 F.2d 374, 378 (7th Cir. 1987), *Wainwright Bank & Trust Co.* v. *Railroadmens Federal Sav. & Loan Ass'n of Indianapolis*, 806 F.2d 146, 149 (7th Cir. 1986). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp*. v. *Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986), *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986), *Trautvetter* v. *Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990). The existence of factual disputes is sufficient to deny summary judgment only if the disputed facts are outcome determinative. *UNR Industries, Inc*. v. *Walker* (*In re UNR Industries, Inc*.), 224 B.R. 664, 665 (Bankr. N.D. Ill. 1998), *Jones Truck Lines, Inc.* v. *Republic Tobacco, Inc.*, 178 B.R. 999, 1003 (Bankr. N.D. Ill. 1995). The burden is on the moving party to show that no genuine issue of material fact exists. *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552, *Matsushita*, 475 U.S. at 585-87, 106 S. Ct. at 1355-56, *Matter of Chicago, Missouri & Western Ry. Co.*, 156 B.R. 567 (Bankr. N.D. Ill. 1993). This burden is met when the record, as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita*, 475 U.S. at 586.

On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586, *citing U.S.* v. *Diebold, Inc*., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962). However, the party opposing the motion may not rest upon pleadings, allegations or denials. The response of that party must set forth specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Summary judgment must be entered against a party who fails to show the existence of an essential element of that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. In that situation, there is no genuine issue of material fact since a total failure of proof concerning an essential element of the case renders all other facts immaterial. *Id*. at 323. Therefore, the moving party is entitled to judgment as a matter of law. *Id*.

DISCUSSION

Plaintiff alleges that he has established a prima facie case demonstrating that the transfers in question satisfy all the requirements for an avoidable preference under § 547(b) and that, as a matter of law, he is entitled to summary judgment in his favor on the adversary complaint.

Cardone disputes Plaintiff's claim that he is entitled to summary judgment. Cardone asserts an affirmative defense under § 547(c)(2), claiming that the transfer took place within the ordinary course of business. Cardone also asserts a second affirmative defense under § 547(c)(4), claiming that it provided sufficient subsequent new value to Whitlock to prevent avoidance of the transfers. Cardone argues that these affirmative defenses prevent avoidance of the transfers in question, defeat Plaintiff's motion for summary judgment, and entitle Cardone to summary judgment in its favor.

While acknowledging that some new value has been extended, Plaintiff contends that the amount of new value extended is insufficient to offset the preferential payments and that Cardone cannot successfully establish that the payments in question were made in the ordinary course of business.

For either party to prevail on a motion for summary judgment, they must demonstrate that there exist no genuine issues of material fact and that they are entitled to judgment as a matter of law. For preference actions under § 547, "the trustee has the burden of proving the avoidability of a transfer

under subsection (b) of this section, and the creditor or party in interest against whom recovery and avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section." 11 U.S.C. § 547(g).

To succeed on his motion, Plaintiff must ultimately prove, by a preponderance of the evidence, that the transfers in question meet the criteria set forth in § 547(b). Section 547(b) provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
>
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4)made-
> (A) on or within 90 days before the date of the filing of the petition;
> * * *
> (5) that enables such creditor to receive more than such creditor would receive if-
> (A) the case were a case under Chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

Plaintiff, in his statement of undisputed facts drafted pursuant to Local Bankruptcy Rule 402(M), asserts that the transfers in question were made to or for the benefit of Cardone, while Whitlock was insolvent and within 90 days of the filing of Whitlock's Chapter 11 bankruptcy petition, and on account of antecedent debt owed by Whitlock to Cardone. Plaintiff further asserts that the transfers enabled Cardone to receive more than it would have, had it not received the transfers and had it been paid solely from a Chapter 7 liquidation. Plaintiff's 402(M) Statement, ¶¶ 10, 11, 12, 15.

Cardone concedes that the payments were made during the preference period, to or for the benefit of Cardone, and on account of antecedent debt. Cardone also acknowledges that it received,

through the preferential payments, an amount greater than that to which it would have been otherwise entitled in a Chapter 7 liquidation. Of the required elements of Trustee's prima facie case, Cardone disputes only that Debtors were insolvent at the time of the transfers. All of Plaintiff's other factual assertions related to § 547(b) are not disputed and are therefore deemed admitted. Local Bankr. R. 402(N)(3)(b).

While Cardone seeks to reserve the right to dispute Plaintiff's insolvency at the time of transfers, Cardone fails to adequately comply with the requirements of Local Bankruptcy Rule 402(N). According to Local Rule 402(N)(3)(a), if an opposing party seeks to dispute any of the moving party's factual assertions, the opposing party is required to provide "specific references to the affidavits, parts of the record and other supporting materials relied upon." Local Bankr. R. 402(N). Failure to adhere to the requirements of Local Rule 402(N) results in the treatment of the moving party's factual assertions as admitted by the opposing party. *In re Bryson*, 187 B.R. 939, 944 (Bankr. N.D. Ill. 1995). Cardone fails to support its attempted reservation of the dispute with either factual allegations or references to affidavits or other evidence which places the issue in controversy. Thus, Debtors' insolvency at the time of the transfers will be considered undisputed.

Because Debtors' insolvency is presumed under § 547(f) and deemed admitted by Cardone, none of the elements of § 547(b) remain in dispute and Plaintiff is deemed to have met his burden of proof with regard to § 547(b). Therefore, Plaintiff will be entitled to judgment as a matter of law and thus, summary judgment, unless Defendant can establish the existence of a genuine issue of material fact with regard to either of its affirmative defenses brought under § 547(c).

Cardone's Affirmative Defense under § 547(c)(2)

Cardone first asserts that the payment received from Debtors may not be avoided and

recovered because the transfer was within the bounds of the ordinary course of business exception to avoidable preferences, set forth in § 547(c)(2).

Section 547(c)(2) provides that:

> The trustee may not avoid under this section a transfer -
> (2) to the extent that such transfer was -
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms.

11 U.S. C. § 547(c)(2). It is well-settled that subsections (A), (B), and (C) are distinct requirements and the existence of each must be established separately by Cardone. *Milwaukee Cheese Wisconsin, Inc*. v. *Straus (Matter of Milwaukee Cheese, Inc.)*, 191 B.R. 397, 400 (Bankr. E.D. Wis. 1995). For a factual dispute to be considered material, or for Cardone to prevent Plaintiff from being entitled to judgment as a matter of law, Cardone must therefore establish the existence of all three elements of the affirmative defense.

Because Cardone has filed a cross-motion for summary judgment in its favor, this court will determine first, if Cardone has sufficiently established the existence of each element of its asserted defense; second, if any genuine issues of material fact exist and whether Plaintiff is entitled to summary judgment in his favor; and finally, if Plaintiff is not entitled to summary judgment, whether Cardone is entitled to summary judgment in its favor.

Under § 547(c)(2)(A), Cardone must establish that the debt incurred by Whitlock was incurred in the ordinary course of business between the parties. According to the Seventh Circuit, Cardone must show that the debt was incurred in keeping with the parties' prior course of dealing. *Barber* v. *Golden Seed Co.,* 129 F.3d 382, 390 (7th Cir. 1997). Cardone alleges that it continuously served as

an inventory supplier of remanufactured automotive parts and that the debts in question were incurred from Debtors' purchase of automotive parts, an integral part of Debtors' business. Cardone has provided evidence of a great number of transactions between the parties, in which debts for remanufactured after-market automotive parts were routinely incurred. Further, Cardone states that the terms on which Debtors incurred the debt in question were substantively identical to those applicable throughout Debtors' relationship with Cardone. Memorandum in support of Defendant's cross motion for summary judgment, p. 7. Plaintiff does not dispute that a genuine issue of material fact exists as to § 547(c)(2)(A), but attempts to reserve the right to require Cardone to prove the element at trial. Plaintiff fails, however, to offer any evidence to demonstrate that the debt was incurred outside the ordinary course of business or financial affairs of Debtors and Cardone. Because the debts implicated in the transactions in question appear substantially similar in nature to those previously undertaken and because Plaintiff does not adequately controvert the issue, for purposes of Plaintiff's motion, Cardone has sufficiently demonstrated the existence of the element required by § 547(c)(2)(A).

Under § 547(c)(2)(B), Cardone must next establish that the transfer was made in the ordinary course of business or financial affairs of Debtors and Cardone. Therein, to determine whether a transfer may be considered within the ordinary course of business and financial dealings of a plaintiff and defendant, courts will look to the course of dealing between the parties established before the preference period. *In re Crystal Medical Products,* 240 B.R. 290, 299 (Bankr. N.D. Ill 1999). To determine if such a transfer was "ordinary," courts will often consider whether the creditor engaged in any unusual collection activity during the 90 days preceding the bankruptcy filing, the length of time during which the parties engaged in the transactions at issue, whether the amount or form of tender differed from past practices, and whether the creditor took advantage of the debtor's deteriorating

financial condition. *In re Crystal Medical Products,* 240 B.R. at 299, *citing Schwinn Plan Comm.* v. *AFS Cycle & Co., Ltd.* 205 B.R. 557, 572 (Bankr. N.D. Ill. 1997); *Solow* v. *Ogletree, Deakins, Nash, Smoak & Stewart* (*In re Midway Airlines, Inc.*) 180 B.R. 1009, 1013 (Bankr. N.D. Ill. 1995).

Cardone and each of the Debtors engaged in the sale and purchase of remanufactured after-market automotive parts on numerous occasions for a period greater than ten years. While often employing set credit terms with fixed payment deadlines, the parties have also engaged, on several occasions, in transactions employing extended credit terms and allowing payments of outstanding balances over a number of months. In addition, the size of payments and the number of invoices paid by each payment have been subject to considerable variation. Plaintiff argues that Cardone's varying extension of credit on both 60 day terms and extended terms precludes the sufficient establishment of a prior course of dealing between the parties for examination.

With an examination of the facts in the light most favorable to Cardone, the length of the relationship of the parties and the frequent use of both regular and extended credit terms depict a fairly consistent long term prior course of dealing between the parties in which erratic practices, potentially in an effort to accommodate Debtors' financial condition, have been an ordinary part of dealings between the parties. Cardone sets forth evidence of the parties' dealings during the two year period prior to the preference, and asserts that the two year period is, in turn, reflective of the financial dealings of the parties in the time before it. During all such times, Cardone alleges, the parties employed a variable system frequently using both set and extended credit terms to govern their transactions.

Cardone argues that the parties' erratic prior history of dealings, in which the creditor has varied its terms to accommodate the financial situation of the debtor, may nevertheless sufficiently

establish a "prior course of dealing" for purposes of § 547(c)(2)(B). Cardone alleges that, despite the large number and size of invoices paid and despite the great degree of variance in number of days each payment was past due, the preference payments were consistent with those made prior to the preference period. Cardone states that throughout their previous dealings, Debtors often paid multiple invoices with a single payment and, because of the terms under which Cardone supplied inventory to debtors, such invoices would regularly be due at different times after the debt was incurred. Finally, Cardone denies having engaged in any unusual collection activities and points out that Plaintiff has failed to allege that abnormal collection activities took place. Making all reasonable factual inferences in the light most favorable to Cardone, this Court finds that Cardone has sufficiently shown evidence supporting the existence of the element in opposition to Plaintiff's motion for summary judgment.

While Cardone has demonstrated the existence of the element, Cardone's showing is insufficient to warrant judgment as a matter of law in Cardone's favor under § 547(c)(2)(B). Plaintiff argues that the previous exchanges between Debtor and Cardone were too sufficiently varied and erratic to conclusively demonstrate any reliable standard for comparision arising from the parties' prior course of dealing. Plaintiff details a payment history with a considerable amount of fluctuation and points out that the final payment made during the preference period was much larger than most other payments made by Debtors in the two years preceding bankruptcy.

For additional support, Plaintiff points to the fluctuation evident in the payment history between periods of weekly payments followed by periods of monthly payments and extremely large payments and extremely small ones. Plaintiff contends that there is too severe a degree of fluctuation and too great a divergence in practices for any reasonable standard to be established representing the course of Debtors' prior dealings with Cardone. Lacking a consistent basis for comparison, Plaintiff argues that

Cardone cannot sufficiently establish that the preferential payments were consistent with such practices. As stated above, when making all inferences in a light most favorable to Cardone, however, the erratic history is sufficient to suggest that the preference payments were in line with the prior course of dealing between the parties.

For the purposes of Cardone's cross-motion for summary judgment, however, Plaintiff is entitled to have all reasonable factual inferences made in his favor and against Cardone. After making such inferences, there arises a genuine issue of material fact as to whether any reliable accounting of the parties' prior course of dealing has been sufficiently established and also whether the preferential transfers were consistent with such a prior course of dealing. As a result, Cardone cannot be granted summary judgment with respect to its affirmative defense under § 547(c)(2).

Because, for Cardone to successfully assert the ordinary course of business affirmative defense and withstand Plaintiff's motion for summary judgment, Cardone must establish the existence of each of the elements of § 547(c)(2) separately, Cardone must also demonstrate that the transfers were made "within ordinary business terms." 11 U.S.C. § 547(c)(2)(C). "Ordinary business terms" has been interpreted to refer to the standards adhered to by the transferee's competitors in the industry involved. *In re Crystal Medical Products*, 240 B.R. at 299. To meet the requirements of § 547(c)(2)(C), Cardone must first identify the relevant industry involved and second, demonstrate through an objective examination of the industry's standards and practices that the transfers fall within the outer boundaries of the industry. *Moglia* v. *ISP Technologies, Inc.*, (*In re DeMert & Dougherty, Inc.*), 233 B.R. 103, 108 (Bankr. N.D. Ill. 1999); *Milwaukee Cheese*, 191 B.R. at 400. Evidence of Cardone's practices in relation to other purchasers is insufficient to establish industry standards. Rather, Cardone must present evidence of the actual practices of its competitors and show that the transfers at issue

were within the outer boundaries of the industry standards evidenced by the practices of Cardone's competitors. *In the Matter of Midway Airlines, Inc.*, 69 F.3d 792, 795 (7th Cir. 1995). In an attempt to establish that the transfers were within such boundaries, Cardone proffers two affidavits from Daniel E. Griffin, Vice President and General Manager of MEMA Financial Services Group, Inc. ("MEMA FSG"). MEMA FSG is a subsidiary of Motor and Equipment Manufacturers Association, ("MEMA") an industry trade group consisting of a majority of major vendors of automotive parts, including Cardone and other suppliers. In his affidavits, Griffin claims considerable knowledge of financial and credit relationships between MEMA members and their customers and specific personal knowledge of the collection practices and payment patterns of various members who compete with Cardone. Griffin states that Cardone's practices and credit terms during the 3 year period preceding the bankruptcy filing are consistent with industry practice and "similar to credit terms offered by other suppliers." Affidavit of Daniel Griffin, December 30, 1999, ¶9. Griffin found both Cardone's ordinary credit terms and Cardone's extended credit terms to be consistent with the treatment of customers by Cardone's competitors in similar situations. Griffin Affidavit, December 30, 1999, ¶¶ 10, 11, 12, 13.

Plaintiff argued that this affidavit is insufficient because MEMA is not a competitor of Cardone's, but rather an industry trade group of which Cardone is a member. Thus, Plaintiff argues, the affidavit failed to set forth actual evidence of competitors' practices. Subsequently, Cardone proffered a second Affidavit of Daniel E. Griffin, sworn to on February 22, 2000, which sets forth a list of specific competitors which employ certain specific credit collection practices also used by Cardone. This proffered affidavit adequately demonstrates that the preferential payments were made within ordinary business terms to suggest the existence of the element of the affirmative defense. For purposes of Plaintiff's motion for summary judgment, a genuine issue of material fact thus exists as to whether the

transfer was made pursuant to ordinary business terms, as well as a genuine issue as to whether the transfer was made in the ordinary course of business between Plaintiff and Cardone. Plaintiff is therefore not entitled to judgment as a matter of law and denial of Plaintiff's motion for summary judgment is thus warranted.

Cardone's Affirmative Defense under § 547(c)(4)

To successfully assert a "new value" affirmative defense under § 547(c)(4), Cardone must demonstrate that the following events have occurred: (1) Cardone must have received a transfer which is otherwise voidable as a preference under § 547(b); (2) After receiving the preferential transfer, the preferred creditor must advance additional credit to the debtor on an unsecured basis; and (3) That additional post-preference unsecured credit must remain unpaid as of the date of the bankruptcy petition. *In re Schwinn Bicycle Co.*, 205 B.R. 557, 568 (Bankr. N.D. Ill 1997) *citing Chaitman* v. *Paisano Auto Liquids, Inc. (In re Almarc Mfg., Inc.)* 62 B.R. 684, 686 (Bankr. N.D. Ill. 1986). It is undisputed that, to the extent that Cardone extended any new value, the value extended was not secured by any security interest. Further, assuming, *arguendo*, that Cardone is ultimately unsuccessfully in its assertion of the ordinary course of business affirmative defense under § 547(c)(2), the preferential transfers would be otherwise avoidable under § 547(b).

While both parties concede that Cardone supplied some new value to the Debtors during the preference period, Plaintiff contends that Cardone is nevertheless not entitled to prevent avoidance of the preferential payments under the new value affirmative defense under § 547(c)(4). Plaintiff argues that Cardone has failed to proffer sufficient competent evidence to establish its affirmative defense. While Cardone has supplied copies of invoices purporting to document the alleged new value, Plaintiff contends that Cardone has failed to adequately authenticate the invoices or establish that the goods

reflected in the invoices were ever received by Debtors. Further, Plaintiff alleges that Cardone is allegedly indebted to Debtors for an amount not less than $80,780.77. Plaintiff claims that this debt results from unapplied credits on the account from the return of certain automotive parts by Debtors to Cardone, which, according to Plaintiff, offsets any new value which could be claimed.

Cardone asserts that it is entitled to prevent avoidance of the transfers in question under § 547(c)(4) because, after receiving the first preferential payment, it supplied Debtors with automotive parts worth more than $185,000.00; and, after receiving the final payment, Cardone supplied Debtor with automotive parts valued in excess of $124,000.00. Cardone argues that the first preferential payment should be offset completely by the new value extended and the second preferential payment should be offset by $124,000.00 as a result of the new value extended. Further, Cardone denies that it owes any money to debtor for any unapplied credits because the goods returned to Cardone were used automotive parts referred to as "cores" which had no cash value to Debtors. To support such a proposition, Cardone refers to the Debtors-in-Possession's motion to return goods pursuant to §546(h)[4] in which Debtors in Possession sought release of these cores from the estate, and stated that the cores had no value to Whitlock, thus such a release would not diminish the assets of estate. In addition, the goods were returned and the credits were issued after Debtors had filed bankruptcy petitions and were ultimately applied to the outstanding amounts on Cardone's pre-petition claims. Affidavit of Frank Travaline, February 23, 2000, ¶¶ 11, 12. Therefore, Cardone admits that if it is unable to succeed on its affirmative defense under §547(c)(2), the new value defense will leave an amount not exceeding $138,949.25 recoverable as a preferential payment.

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[4] Now, 11 U.S.C. §546(g).

In support of its new value defense, Cardone has subsequently provided a second affidavit of Frank Travaline, credit manager for Cardone. This affidavit, sworn to on February 23, 2000, supplements a prior affidavit submitted by Travaline, filed with this court on January 6, 2000. In the second affidavit, Travaline recounts his review of the payment and credit history between Cardone and Debtors. Travaline states that the spreadsheet, provided by Cardone, reflects the payments and invoices arising from the financial dealings of Cardone and Debtors during the three years prior to Debtors' bankruptcy filings and is an "accurate and reliable compilation" thereof. Travaline also states that the spreadsheet is consistent with his personal knowledge of the transactions between Debtor and Cardone which took place during that time. Further, Travaline states that the invoices generated by orders placed by the Debtors during the preference period were accurate and "Cardone shipped the goods itemized on those invoices on the dates shown in the filed headed 'Date Shipped.'" Travaline's affidavit thus supports Cardone's assertion that the invoices accurately reflect the amount of new value extended.

Travaline's affidavit does not, however, establish that all the inventory allegedly shipped as new value to Debtors was actually received by Debtors during the preference period, prior to the filing of their respective bankruptcy petitions. Travaline states merely that "To the best of my knowledge, the Debtors received the goods itemized in those invoices and shipped on those dates." Travaline affidavit, February 23, 2000, ¶ 6. Proof that the goods in question were actually received by Debtors during the preference period is an essential element of the new value defense. *Schwinn Plan Comm.* v. *AFS Cycle & Co.* (*In re Schwinn Bicycle Co.*), 205 B.R. 557, 563, 1997 Bankr. LEXIS 233 (Bankr. N.D. Ill. 1997).

Because Cardone has failed to conclusively establish that the goods were actually received

during the preference period, a genuine issue of material fact arises. There also exists a genuine issue of material fact as to the amount of new value actually extended during the preference period. As a result, Cardone is not entitled to summary judgment in its favor on its affirmative defense under § 547(c)(4).

Disallowance of Claims under § 502(d)

Finally, Plaintiff seeks disallowance of Cardone's claims against Debtors' estate under § 502(d). Section 502(d) states, in pertinent part:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity... that is a transferee of a transfer avoidable under section... 547 of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section....550 of this title.

11 U.S. C. § 502(d). At this time, it is improper for the Court to rule as to § 502(d). If Plaintiff is ultimately successful in the present action, and if Cardone thereafter disgorges and returns the preferential payments avoided under § 547(b) to the estate, Cardone's claim will be allowed under § 502(h). If Trustee is successful and Cardone does not turn over the preferences to the estate, however, § 502(d) will operate to disallow any claims filed by Cardone. *Solow* v. *Greater Orlando Aviation Authority (In re Midway Airlines)*, 175 B.R. 239, 247 (Bankr. N.D. Ill. 1994).

CONCLUSION

Cardone has demonstrated genuine issues of material fact relating to its asserted affirmative defenses under §§ 547(c)(2) and (4). Therefore, Plaintiff's motion for summary judgment is denied. Cardone has also failed to demonstrate that it is entitled to judgment as a matter of law on its motion for summary judgment. Accordingly, Cardone's cross-motion for summary judgment is denied.

ENTERED:

Date:

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Erwin I. Katz
United States Bankruptcy Judge